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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No. 76-1123

BROADMOOR APARTMENTS, INC., ET AL,

Petitioners

Versus

COLLECTOR OF REVENUE,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF LOUISIANA

THEODORE L. JONES
Post Office Box 2706
Baton Rouge, Louisiana 70821
ATTORNEY FOR PETITIONERS

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BROADMOOR APARTMENTS, INC., ET AL,
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF LOUISIANA

Petitioners, Broadmoor Apartments, Inc., Sherwood Park Apartments, Inc., and Regency Apartments, Inc., appearing through counsel, respectfully petition this Honorable Court for a Writ of Certiorari to review a decision of the Supreme Court for the State of Louisiana, rendered in this cause on November 16, 1976.

OPINIONS BELOW

The decision or opinion of the Supreme Court of Louisiana denying certiorari or writ of review was entered on November 16, 1976, and is reproduced as Appendix A, infra. The opinion of the Court of Appeal, First Circuit, State of Louisiana, from which the application for certiorari or writ of review was taken, was entered June 30, 1976, and is reproduced herewith as Appendix B, infra. This decision is reported in 336 So. 2nd 332.

JURISDICTION

The decision or opinion of the Supreme Court of Louisiana was rendered on November 16, 1976. This Petition for Certiorari is being filed less than 90 days from the date the Application for Writ of Certiorari or Writ of Review was denied. The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, Section 1257(3).

QUESTIONS ANSWERED

I. Whether or not funds borrowed by an agent for its principal (i.e. individuals) constituted borrowed capital of the agent under LSA-R.S. 47:601.

STATUTES INVOLVED

This case involves Article 1, Section 10, and the Fourteenth Amendment to the Constitution of the United States of America.

LSA-R.S. 47:601 provides:

"Every domestic corporation and every foreign corporation, exercising its charter, or qualified to do business or actually doing business in this state, or owning or using any part or all of its capital, plant or any other property in this state, subject to compliance with all other provisions of law, except as otherwise provided for in this Chapter shall pay an annual tax at the rate of $1.50 for each $1,000.00, or major fraction thereof on the amount of its capital stock, surplus, undivided profits, and borrowed capital, determined as hereinafter provided; the minimum tax shall not be less than $10.00 per year in any case. The tax levied herein is due and payable on any one or all of the following alternative incidents:

"(1) The qualification to carry on or do business in this state or the actual doing of business within this state in a corporate form. The term 'doing business' as used herein shall mean and include each and every act, power, right, privilege, or immunity exercised or enjoyed in this state, as an incident to or by virtue of the powers and privileges acquired by the nature of such organizations, as well as, the buying, selling or procuring of services or property.

"(2) The exercising of a corporation's charter or the continuance of its charter within this state.

"(3) The owning or using any part or all of its capital, plant or other property in this state in a corporate capacity.

"It being the purpose of this section to require the payment of this tax to the State of Louisiana by domestic corporations for the right granted by the laws of this state to exist as such an organization, and by both domestic and foreign corporations for the enjoyment, under the protection of the laws of this state, of the powers, rights, privileges and immunities derived by reason of the corporate form of existence and operation. The tax hereby imposed shall be in addition to all other taxes levied by any other statute."

LSA-R.S. 47:603 provides:

"As used in this Chapter, 'borrowed capital' means all indebtedness of a corporation, subject to the provisions of this Chapter, maturing more than one year from the date incurred, or which is not paid within one year from the date incurred regardless of maturity date. As to any indebtedness which is extended, renewed or re-financed, the date such indebtedness was originally incurred or contracted shall be considered for the purpose of this definition the date in-

curred or contracted. With respect to amounts owed by a taxpayer corporation to an affiliate, all real and actual indebtedness, regardless of age, and which in fact represent capital substantially used to finance or carry on the taxpayer's business, shall be borrowed capital. An 'affiliated corporation' is any corporation which through stock ownership, directorate control, or other means, substantially influences policy of some other corporation or is influenced through the same channels by some other corporation."

STATEMENT OF THE CASE

This is a suit for redetermination of corporate franchise tax liability for taxable years ending December 31, 1969, December 31, 1970, December 31, 1971 and December 31, 1972 that was instituted by Broadmoor Apartments, Inc., Sherwood Park Apartments, Inc., and Regency Apartments, Inc., hereinafter referred to collectively as Petitioners. The suit was initiated on September 14, 1972 with the Board of Tax Appeals resulting from the respondent's notice of assessment of taxes in the following amounts:

Year	Broadmoor	Sherwood Park	Regency
12/31/69	$2,003.00	$1,107.50	
12/31/70	1,928.00	1,062.50	$ 3,776.00
12/31/71	1,763.00	998.00	3,645.00
12/31/72		927.50	3,525.00
Total Taxes	$5,694.00	$4,095.00	$10,946.50

In addition to the taxes, the assessment includes penalties and interest which continues to accrue from the due date until paid. On November 26, 1974, the Board of Tax Appeals rendered judgment in favor of the Collector of Revenue approving and confirming the taxes and assessments set forth in the Collector's "Notice of Assessment." On December 23, 1974, Petitioners filed a Petition for Judicial Review of the decision rendered by the Board of Tax Appeals with the Nineteenth Judical District Court for the Parish of East Baton Rouge. On November 19, 1975, said court affirmed the decision of the Board of Tax Appeals. Petitioners filed a Motion for New Trial on December 1, 1975, which motion was denied on December 2, 1975. Petitioners appealed suspensively from the judgment, and the appeal was lodged in the First Circuit Court of Appeal on December 12, 1975. On June 30, 1976, the First Circuit Court of Appeal affirmed the decision of the trial court. On July 14, 1976, Petitioners filed an Application for Rehearing with the First Circuit Court of Appeal, which application was refused on August 27, 1976. On September 24, 1976, Petitioners filed an Application for Writ of Certiorari or Writ of Review from the Court of Appeal, First Circuit, State of Louisiana with the Supreme Court of Louisiana, which application was denied on November 16, 1976.

STATEMENT OF FACT

The following excerpt from the written opinion of the Court of Appeal, First Circuit, State of Louisiana, fairly reflects the true nature of the facts involved in the case before the Court herein:

> "There is no dispute regarding the operative facts. In or about 1965 or 1966, a group of individuals (Owners) became interested in acquiring and developing tracts of commercial properties in the Baton Rouge, Louisiana area. To facilitate financing and to provide a consistent managerial program for the proposed endeavors, Owners opted to create three corporations to act for and represent Owners in the acquisition, development and management of the contemplated projects. Consequently, Appellants

were formed between February 1966 and December 1968.

"Concomitant with the incorporation of Broadmoor and Sherwood, Owners entered into a separate Nominee Agreement with each corporation. A similar Nominee Agreement was confected with Regency in March 1970. The Nominee Agreements, in reality counter letters, appointed each corporation as Owners' agent, to hold, for Owners, title to designated properties and to administer same pursuant to Owners' specific written authorization and instructions. The properties to be acquired by each corporation were described in exhibits attached to the respective agreements. Notwithstanding the agreement dealt with the title and ownership of real property, none of the Nominee Agreements were filed for public record.

"In essence, each agreement contains the following pertinent provisions: (1) The agreement constitutes evidence of Owners' beneficial ownership of the properties involved; (2) Owners designated two agents, Donald A. Hayden and Rolfe H. McCollister, as a committee to represent Owners, which committee was duly authorized to direct the corporation's conduct of Owners' affairs, including the power to instruct the corporation regarding the acquisition, alienation and use of Owners' properties; (3) Appellants were required to remit to Owners, immediately upon receipt, all rentals or proceeds from the use or sale of Owners' properties; (4) Owners agreed to pay Appellants actual costs incurred in rendering services to Owners and also to indemnify Appellants, their officers and directors against any loss or liability resulting from any claim arising from Appellants' activities pursuant to and in accordance with

the Nominee Agreement; (5) Owners promised to pay their pro-rata share of the purchase price of properties together with interest and such other acquisition costs and expenses as might be incurred by Appellants in obtaining property and holding same for Owners' account; (6) Owners agreed to hold the properties in indivision, each individual owner holding a share of ownership as shown on schedules attached to each Nominee Agreement.

"In due time, Appellants were expressely instructed by Owners' agents to acquire, hypothecate and develop the properties referred to in the respective Nominee Agreements. The instructions included obtaining financing for and the construction of rental apartments on portions of the properties. Pursuant to such directions, Appellants each acquired designated tracts of land in their own names, by cash sales in two instances and by sale with mortgage in the remaining case. *Purchase money required for the acquisitions was provided by Owners from their own personal funds, which Owners either had on hand or borrowed as the occasion demanded.* All such acquisitions were duly recorded in the public records of East Baton Rouge Parish.

"In compliance with Owners' instructions, Appellants executed several mortgages on the properties, for both interim and permanent financing. At least two of such mortgages were hypothecations which expressly exempted the mortgagor from personal liability for the debt involved. As additional security for loans to Appellants, several Owners executed continuing guarantees for Appellants' debts, which instruments rendered Owners solidarily liable for the obligations.

"Appellants filed with the Collector of Revenue,

State of Louisiana (Collector), Corporate Income and Franchise Tax Returns for each of the years in question. Said returns each reflect income, expenses and a balance sheet for the periods concerned. The returns also show that each Appellant paid a franchise tax of $10.00 annually, but that each paid no income tax whatsoever. The respective Owners of each project have filed partnership returns for each of these same years. Admittedly, these income tax returns include a full reporting of all income, expenses and other relevant data regarding the several projects and also indicate Owners' distributive shares of the profits and losses from the construction, operation and maintenance thereof. Collector concedes that all such partnership returns are true and correct insofar as concerns the legal issues and principles involved in this action.

* * *

"The record establishes conclusively that Appellants were in fact acting as Owners' agents in the transactions involved herein. The Nominee Agreements or counter letters expressly provide that Appellants have no authority to take any action, sign any documents or make any decisions affecting Owners' property without Owners' express written consent, authorization and direction. In each instance involved. Owners presented Applicants with written instructions for carrying out the acquisition and development of Owners' properties. *Without exception the instructions specifically recite that Appellants are to act solely as Owners' agent in carrying out the mandate."* (Emphasis added.)

REASONS FOR GRANTING THE WRIT

I. The decision or opinion of the Supreme Court of Louisiana is in conflict with decisions of the U. S. Supreme Court with regard to the taxation of an agent for acts of the agent's principal and the settled law of Louisiana.

The decision of the Supreme Court of Louisiana is in conflict with law and should be overturned to insure uniformity of tax treatment of agents. An agent is not taxable on his acts as an agent. The principal is taxable if the tax is applicable at all. In *National Carbide Corp. v. Commissioner,* 336 U. S. 422 (1949), the U. S. Supreme Court stated:

> "What we have said does not foreclose a true corporate agent or trustee from handling the properties and income of its owner-principal without being taxable therefor.
>
> * * *
>
> "If the corporation is a true agent, its relations with its principal must not be dependent upon the fact that it is owned by the principal if such is the case * * * * The essentiality of ownership of the corporation to the existence of any 'agency' relationship in the *Moline Properties, Commonwealth Improvement Co.,* and *Southern Pacific* cases indicates the fallacy of the agency argument made in those cases." (336 U. S. at 437-438)

Petitioners' position is wholly consistent with the above statement from *National Carbide* and with *Commissioner v. State-Adams Corp.,* 283 F.2d 395 (2d Cir. 1960), cert. den. 365 U. S. 844 (1961), the position "is nothing more than a restatement of the fundamental rule that income from real estate held in the name of a nominee will be taxed to the beneficial owner, not to the nominee." Petitioners' owner-principals did not control nor attempt to control Petitioners by stock ownership. Petitioners contracted

to act as agents. The corporate franchise tax does not apply to individuals.

The rules of agency contained in the Civil Code of Louisiana are recognized by the Courts of Louisiana in determining true ownership of property. The U. S. Supreme Court held in *United States v. Mitchell,* 91 S.Ct. 1763 (1971), that "tax liability follows ownership." In the case before the Court, the First Circuit Court of Appeal held that the owners of property are entitled to the revenue derived from such property under relevant Louisiana law. *Broadmoor Apartments, Inc. v. Collector of Revenue,* 336 So.2d 332 (La. App. 1976) at page 336. Petitioners further submit that the Court of Appeal properly analyzed the applicable Louisiana law in order to reach the conclusion that the Owners were the true owners of the property and that Petitioners were merely acting as Owners' agents in the transactions involved herein, but the Court applied the tax contrary to law by holding that the agent is taxable for corporate franchise tax purposes on funds "borrowed" through the agents.

As noted by the Court of Appeal in its opinion, each Nominee agreement contains the following provisions: (1) The agreement constitutes evidence of Owners' beneficial ownership of the properties involved; (2) Owners designated two agents as a committee to represent Owners, which committee was duly authorized to direct the corporation's conduct of Owners' affairs, including the power to instruct the corporation regarding the acquisition, alienation and use of Owners' properties; (3) Petitioners were required to remit to Owners, immediately upon receipt, all rentals or proceeds from the use or sale of Owners' properties; (4) Owners agreed to pay Petitioners' actual costs incurred in rendering services to Owners and also to indemnify Petitioners, their officers and directors against any loss or liability resulting from any claim arising from Petitioners' ac-

tivities pursuant to and in accordance with the Nominee Agreement; (5) Owners promised to pay their pro-rata share of the purchase price of properties together with interest and such other acquisition costs and expenses as might be incurred by Petitioners in obtaining property and holding same for Owners' account; (6) Owners agreed to hold the properties in indivision, each individual owner holding a share of ownership as shown on schedules attached to each Nominee Agreement. Under these contracts Petitioners did not use any of the borrowed funds in the conduct of Petitioners' business nor were the Petitioners indebted to anyone. The Court of Appeal in relying upon *State v. Union Building,* 185 La. 598, 170 So. 7 (1936), applied the tax statute incorrectly. The debt contracted by and through the corporate agents for the principals were the debts of the principals or against the principal's property and not of the agents. LSA-C. C. Arts. 2986, 3012, 3013, and 3021.

Each Petitioner's role in relation to the property was in fact one of simply agency-fiduciary and this relationship is found in the section of the Louisiana Revised Civil Code dealing with Mandate. A mandate, procuration or power of attorney is an act by which one person, e.g., the true owner of the property gives power to another, e.g., the nominee-agent corporation, to transact for him one or several affairs. cf. RCC Art. 2985, et seq. For such a relationship to exist, it is not necessary for the mandatory or agent to act in the name of the principal, i.e., he may act in his own name. *Senteel v. Richardson,* 211 La. 288, 29 So.2d 852 (1947). The Code also provides that the mandate may be created solely for the interest of the person granting it. LSA-C.C. Art. 2986.

The settled law of Louisiana is codified in LSA-C.C. Art. 2985, et seq. These articles provide that an agent (mandatory) may act for, in the name of, or on behalf of the principal and the acts of the agent are the acts of the prin-

cipal so long as the object of the mandate is lawful. LSA-C.C. Arts. 2985, 2987, 3002 and 3021; *Miller v. Powers & Tuttle,* 145 So. 718 (La. App. 2d Cir. 1933); *Northwestern Union Packet Co. v. Clough,* 87 U. S. 528 (1874); *Lewis v. Watson,* 98 Ala. 479, 13 So. 570 (1893).

A debt contracted by and through a corporate agent for its principal is the debt of the latter and not the former. LSA-C.C. Arts. 2985, 2997, 3012, 3013 and 3021; *J. H. Maury & Co. v. Louis Ranger & Co.,* 38 La. Ann. Repts. 485 (1886); *Northwestern Union Packet,* 87 U. S. 528 (1874); *Lewis,* 98 Ala. 479, 13 So. 570 (1893); *Central National Bank v. Royal Insurance Co.,* 103 U. S. 783 (1880); *Perrotin v. Cucullu,* 7 La. 587 (1834); *Curl v. Bond,* 52 La. Ann. 1052, 27 So. 577 (1900); *Williams v. Winchester,* 7 Mart. (N. S.) 22 (1828); *Carlisle v. The Eudora,* 5 La. Ann. 15 (1850); *Hopkins v. LaCouture,* 4 La. 64 (1832); *Builders Center, Inc. v. Smith,* 228 So. 2d 245 (La. App. 1st Cir. 1969); *Neiman-Marcus Co. v. Viser,* 140 So.2d 762 (La. App. 2d Cir. 1962).

It is further pointed out that the mere handling of property for another has often been implied as constituting a principal/agent relationship. In *State v. Hagerty,* 205 So.2d 369 (1967), the Louisiana Supreme Court stated:

> "One is said to act in a fiduciary capacity *** when the business which he transacts, or the money or property which he handles is not his own or for his own benefit, but for the benefit of another person." (205 So.2d at 374.)

What is taxable borrowed capital? LSA-R.S. 47:603, as amended, provides:

> "As used in this Chapter, 'borrowed capital' means all *indebtedness of a corporation,* subject to the provisions of this Chapter, maturing more than one year from the date incurred, or which is not paid within one year from the date incurred, or which is not

> paid within one year from the date incurred regardless of maturity date." (Emphasis added.)

A literal reading of the statute shows that taxable borrowed capital is indebtedness contracted *solely for the account of and use of a corporation in its own business.* LSA-R.S. 47:601, 602 and 603; *HEP Development v. Collector,* 256 So.2d 744 (1971), writ refused 256 So.2d 377 (1972). Debts contracted by a corporate agent for its principal are not indebtedness of the agent.

> In conjunction therewith, LSA-R.S. 47:602 provides: "Every corporation taxed under this Chapter shall determine the amount of *its* issued and outstanding capital stock, surplus, undivided profits and *borrowed capital* as the basis for computing the franchise tax levied under this Chapter and determining the event of the use of its franchise in this state." (Emphasis added.)

In complying with the franchise tax statutes, the corporate agents — Petitioners herein — respectively, owned no indebtedness and, hence, paid the franchise tax only on their own capital stock, surplus, undivided profits and borrowed capital for each year.

In *HEP Development v. Collector,* 256 So.2d 744 (1971), writ refused 258 So.2d 377 (1972), the First Circuit Court of Appeal held that the purchase by a corporation of property "subject to" an existing mortgage constitutes "borrowed capital" of the purchasing corporation within the meaning of R.S. 47:603.

Applied to the facts of the case for Petitioners, it is clear under *HEP Development,* supra, that indebtedness follows ownership of the property. *Mitchell,* 91 S.Ct. 1763 (1971). In *HEP Development,* Corporation A (the seller) gave a mortgage for its own corporate use and on its own property. Corporation A thereafter sold the property to Corporation B (the purchaser) "subject to" the mortgage.

The Court of Appeal, First Circuit, held that Corporation B — regardless of A's liability on the mortgage obligation — was obliged to include the mortgage owed by Corporation A in Corporation B's borrowed capital since Corporation B owned the property and was making use of the borrowed capital in Corporation B's corporate business. The key factor which the Court looked to was that Corporation B was making *use* of the mortgage money. The court reached its conclusion at page 747 of its opinion wherein it stated:

> "Since plaintiff is actually using the amount of the mortgage money invested in subject properties, said funds are deemed borrowed or additional capital which must be taken into consideration in computing the tax in question."

The Court further restated from *State v. Union Building Corporation,* 185 La. 593, 170 So. 7 (1936):

> "* * * manifestly the Legislature intended that the total amount of all capital *made use of by a domestic corporation in the conduct of its business* should be used as a basis for computing the franchise or license tax * * * *"
>
> "We understand the foregoing language in Union Building * * * to mean that for purposes of the tax in question that if a corporation *makes use in its business* of any borrowed or additional capital * * * such capital must be considered in computing the tax in question." cf. *Helvering v. Lazarus,* 308 U.S. 252 (1939). (Emphasis added.)

HEP Development, supra, holds that indebtedness on property, though the mortgage is in the name of the seller, belongs to the purchaser even though the latter took the property "subject to" the mortgage. This holding shows that the user of the borrowed capital is the key factor in applying the franchise tax regardless of who executed the mortgage on the public records. Moreover, the nominee agreement is conclusive on this point.

While the factual situation in the present case is different, it is clear that Petitioners, as agents, did not use the borrowed funds in their business or for their own corporate purpose. The evidence shows conclusively that (1) Petitioners were agents and nominees and the proceeds were for the exclusive benefit of the partners; (2) Petitioners made no use of and did not contract for funds for its own corporate purpose or use; (3) Petitioners do not owe the mortgagee; (4) Petitioners are obliged to transfer the property on the public records at any time same is demanded by the owners; (5) Petitioners are entitled to receive full indemnification from loss; (6) Petitioners do not own any part of interest in the property, its income or expenses; (7) Petitioners act according to instructions from the owners; and (8) no taxable event has taken place.

The nominee-agreement-counter letter is good between the parties and operates as a deed. *Karcher v. Karcher,* 70 So. 228; *Louis v. Garrison, et al,* 64 So. 2d 254 (La. App. 1965); *Haggard v. Rushing,* 76 So.2d 52 (4th Cir., 1954); *LeFleur v. Guillory,* 181 So.2d 323 (3rd Cir., 1965); *Lawrence v. Claiborne,* 41 So.2d 680 (1949). Hence, a recorded mortgage does not control. The question is who uses the capital. *HEP Development,* 256 So.2d 744 (1971). The substance of the transaction controls, not the form. *Helvering v. Lazarus,* 308 U. S. 252 (1939).

In this case , if the owners of the property were a corporation, then *HEP Development,* 256 So.2d 744 (1971) would require the owner-corporation to include in its franchise tax base the mortgage amount as borrowed capital even though the mortgages are recorded in the name of petitioners. *However, the owners are individuals and as such are not liable for the corporation franchise tax.* Petitioners likewise are not liable because they do not own the

property, are not making use of the borrowed capital for their own corporate purpose, and Petitioners are agents with respect to the entire transaction, and nothing more.

II. The decision or opinion of the Supreme Court of Louisiana impairs the obligation of the agency contract contrary to the Constitution of the United States of America.

The decision of the Supreme Court of Louisiana affirming the decision of the Court of Appeal, First Circuit, State of Louisiana impairs the obligation of the agency contract and destroys the right to contract for any legitimate purpose not contrary to public policy. The Constitution of the United States of America prohibits the State of Louisiana from passing any law impairing the obligation of contracts. Article Section 10. This provision is a limitation upon the taxing power of the states. In *Murray v. Charleston,* 96 U. S. 432, 24 L.Ed. 760 (1877), this Court held that a change of the express stipulations of a contract can no more be effected by an exertion of the taxing power than it can be by the exertion of any other power of a state legislature. Since the levy of the corporate franchise tax herein disregards the contractual relationship between the agent and his principal, the imposition of the tax in disregard of petitioner's contractual relationship operates as an impairment of the contract contrary to the prohibition of the United States Constitution.

According to the Civil Code, Articles 2985, et seq., a mandate is an act by which one person gives power to another to transact for him. The power is given by public act or by a writing under private signature. The authority of the agent is thus conferred by contract. The authority of Petitioners to act as Owners' agents is a contractual right and is not derived, as the Court of Appeal held, from the agent's articles of incorporation. The functions which Petitioners performed were not in the conduct of its purposes for which incorporated, but rather were performed for the Owners as principals by virtue of a bona fide contractual agreement. The corporate power to act as agent pursuant to a contractual agreement in a fiduciary capacity is not basis for taxation and not so contemplated by LSA-R.S. 47:601 and 603.

In its written opinion, the Court of Appeal found the principles stated in *State v. Union Building Corporation,* 185 La. 598, 170 So. 7, to be applicable and controlling. However, the Court's decision is not consistent with the principles enunciated in said case nor are they consistent with the case of *HEP Development Corporation v. Mouton,* 256 So.2d 744, which was subsequently decided by the same First Circuit Court of Appeal. Both of the cited cases announced that the legislative intent of R.S. 47:603 was for the total amount of all capital *made use of by a domestic corporation in the conduct of its business* to be used in the base for computing the franchise tax. However, Petitioners made no use of the borrowed funds in the conduct of its own affairs. Petitioners acted to obtain and were obliged by contractual agreement to turn over the funds as instructed by the principals. LSA-C.C. Art. 3005. No part of the funds were used or invested in Petitioners' business. None of the funds in question were diverted to the personal use of Petitioners nor did the funds come into the possession of the Petitioner. The funds were not used to acquire any assets for the corporation. As stated by the Louisiana Supreme Court in the *State v. Union Building Corporation,* 185 La. 598, 170 So. 7, at page 12 of its opinion, the amount of the tax is computed on the amount of capital *put* into the business. It refers to capital invested in the business for the account of the corporation and not to amounts held for the account of others which are not invested or put into the business of the corporation. The Court of Appeal in its

written opinion at page 336 recognized that Petitioners were in fact acting as Owners' agents in the transactions involved herein and that the property did in fact belong to the Owners.

The imposition of the tax upon Petitioners impairs the obligation of contract between Petitioners and its principals and fails to give effect to the following provisions contained in the Nominee agreements: (1) The agreement constitutes evidence of Owners' beneficial ownership of the properties involved; (2) Owners designated two agents as a committee to represent Owners, which committee was duly authorized to direct the corporation's conduct of Owners' affairs, including the power to instruct the corporation regarding the acquisition, alienation and use of Owners' properties; (3) Petitioners were required to remit to Owners, immediately upon receipt, all rentals or proceeds from the use or sale of Owners' properties; (4) Owners agreed to pay Petitioners actual costs incurred in rendering services to Owners and also to indemnify Petitioners, their officers and directors against any loss or liability reulting from any claim arising from Petitioners' activities pursuant to and in accordance with the Nominee Agreement; (5) Owners promised to pay their pro-rata share of the purchase price of properties together with interest and such other acquisition costs and expenses as might be incurred by Petitioners in obtaining property and holding same for Owners' account; (6) Owners agreed to hold the properties in indivision, each individual owner holding a share of ownership as shown on schedules attached to each Nominee Agreement. The debt contracted by and through the corporate agents for the principals were the debts of the principals and against the principals' property and not of the agents. LSA-C.C. Arts. 2986, 3012, 3013 and 3021.

III. The exaction by the State of Louisiana of the corporate franchise tax from Petitioners constitutes a taking of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States of America.

Respondent's action in imposing a tax upon Petitioners is palpably arbitrary and results in such flagrant and palpable inequity between the burden imposed and the benefit received as to amount to the arbitrary taking of property without just compensation, contrary to the Fourteenth Amendment to the Constitution of the United States of America. *Dane v. Jackson,* 256 U. S. 589, 65 L.Ed. 1107, 41 S.Ct. 566 (1921). Imposition of the franchise tax upon Petitioners deprives them of their property without reason or cause and violates the due process clause at it bears no fiscal relation to the protection, opportunities, and benefits given by the state The state has given nothing for which it can ask a return. *National Bellas Hess, Inc. v. Department of Revenue,* 386 U. S. 753, 18 L.Ed.2d 505, 87 S.Ct. 1389 (1967); *Wisconsin v. J. C. Penney Co.,* 311 U. S. 435, 85 L.Ed 267, 61 S.Ct. 246 (1940).

Moreover, Respondent's action in imposing a tax for corporate franchise tax years 1969 and 1970 finds no basis in law since the provisions of LSA-R.S. 47:601 were declared unconstitutional in *Colonial Pipeline Company v. Mouton,* 228 So.2d 718 (La.App. 1969). As a result of this decision, LSA-R.S. 47:601 was amended, but did not become effective until July 13, 1970. Thus, any attempt by Respondent to impose a tax for 1969 and 1970 pursuant to a judicially determined unconstitutional statute constitutes an arbitrary taking of property without due process of law.

CONCLUSION

For the above and foregoing reasons, Petitioners pray that a Writ of Certiorari issue to review the judgment of the Supreme Court for the State of Louisiana.

RESPECTFULLY SUBMITTED:

McCOLLISTER, BELCHER, McCLEARY,
FAZIO, MIXON, HOLLIDAY & JONES
Post Office Box 2706
Baton Rouge, Louisiana 70821
Telephone: (504) 387-5961

ORIGINAL SIGNED BY:
TED L. JONES

By: _____

THEODORE L. JONES

CERTIFICATE OF SERVICE

I, Theodore L. Jones, counsel for petitioners, in the foregoing application for writ of certiorari, do hereby certify that I have served copies of the foregoing application for writ on:

David L. Dawson
Collector of Revenue
P. O. Box 201
Baton Rouge, Louisiana 70821

by mailing copies thereof, through the United States Mail, postage prepaid, addressed to his respective office on the 14th day of February, 1977.

All parties required to be served have been served.

ORIGINAL SIGNED BY:
TED L. JONES

By: _____

THEODORE L. JONES

APPENDIX A

SUPREME COURT OF LOUISIANA

New Orleans 70112

BROADMOOR APARTMENTS, INC. ET AL — November 16, 1976

versus

COLLECTOR OF REVENUE — No. 58,657

In re: Broadmoor Apartments, Inc. et al, applying for certiorari, or writ of review, to the Court of Appeal, First Circuit, Parish of East Baton Rouge.

Application denied: no error or law.

/s/ JAD
/s/ FWS
/s/ AT, Jr.
/s/ PFC
/s/ WFM
/s/ JLD

A TRUE COPY
Clerk's Office
Supreme Court of La.
New Orleans
November 16, 1976

/s/ Phil Trice
Deputy Clerk

APPENDIX B

BROADMOOR APARTMENTS, INC., ET AL

versus

COLLECTOR OF REVENUE

State of Louisiana

Court of Appeal

First Circuit

Number 10,776

Appeal from the Nineteenth Judicial District Court,
East Baton Rouge Parish,
Honorable Lewis S. Doherty, III, Judge, Presiding.

Before Landry, Covington and Ponder, JJ
Landry, Judge

Petitioners Broadmoor Apartments, Inc. (Broadmoor), Sherwood Park Apartments, Inc. (Sherwood) and Regency Apartments, Inc. (Regency), sometimes hereinafter referred to as Appellants, appeal from judgment of the trial court sustaining a decision of the Board of Tax Appeal assessing Appellants for corporate franchise taxes for the taxable years 1969, 1970, and 1971. We affirm.

The sole question involved on appeal is whether funds borrowed by a corporation acting as agent are borrowed funds within the purview of La. R.S. 47:601 and 603 and therefore to be considered in determining the amount of corporate franchise taxes due by the borrower.

There is no dispute regarding the operative facts. In or about 1965 or 1966, a group of individuals (Owners) became interested in acquiring and developing tracts of commercial properties in the Baton Rouge, Louisiana area. To facilitate financing and to provide a consistent managerial program for the proposed endeavors, Owners opted to create three corporations to act for and represent Owners

in the acquisition, development and management of the contemplated projects. Consequently, Appellants were formed between February 1966 and December 1968.

Concomitant with the incorporation of Broadmoor and Sherwood, Owners entered into a separate Nominee Agreement with each corporation. A similar Nominee Agreement was confected with Regency in March 1970. The Nominee Agreements, in reality counter letters, appointed each corporation as Owners' agent, to hold, for Owners, title to designated properties and to administer same pursuant to Owners' specific written authorization and instructions. The properties to be acquired by each corporation were described in exhibits attached to the respective agreements. Notwithstanding the agreement dealt with the title and ownership of real property, none of the Nominee Agreements were filed for public record.

In essence, each agreement contains the following pertinent provisions: (1) The agreement constitutes evidence of Owners' beneficial ownership of the properties involved; (2) Owners designated two agents, Donald A. Hayden and Rolfe H. McCollister, as a committee to represent Owners, which committee was duly authorized to direct the corporation's conduct of Owners' affairs, including the power to instruct the corporation regarding the acquisition, alienation and use of Owners' properties; (3) Appellants were required to remit to Owners, immediately upon receipt, all rentals or proceeds from the use or sale of Owners' properties; (4) Owners agreed to pay Appellants' actual costs incurred in rendering services to Owners and also to indemnify Appellants, their officers and directors against any loss or liability resulting from any claim arising from Appellants' activities pursuant to and in accordance with the Nominee Agreement; (5) Owners promised to pay their pro-rata share of the purchase price of properties together with interest and such other acquisition costs and expenses as might

be incurred by Appellants in obtaining property and holding same for Owners' account; (6) Owners agreed to hold the properties in indivision, each individual owner holding a share of ownership as shown on schedules attached to each Nominee Agreement.

In due time, Appellants were expressly instructed by Owners' agents to acquire, hypothecate and develop the properties referred to in the respective Nominee Agreements. The instructions included obtaining financing for and the construction of rental apartments on portions of the properties. Pursuant to such directions, Appellants each acquired designated tracts of land in their own names, by cash sales in two instances and by sale with mortgage in the remaining case. Purchase money required for the acquisitions was provided by Owners from their own personal funds, which Owners either had on hand or borrowed as the occasion demanded. All such acquisitions were duly recorded in the public records of East Baton Rouge Parish.

In compliance with Owners' instructions, Appellants executed several mortgages on the properties, for both interim and permanent financing. At least two of such mortgages were hypothecations which expressly exempted the mortgagor from personal liability for the debt involved. As additional security for loans to Appellants, several Owners executed continuing guarantees for Appellants' debts, which instruments rendered Owners solidarily liable for the obligations.

Appellants filed with the Collector of Revenue, State of Louisiana (Collector), Corporate Income and Franchise Tax Returns for each of the years in question. Said returns each reflect income, expenses and a balance sheet for the periods concerned. The returns also show that each Appellant paid a franchise tax of $10.00 annually, but that each paid no income tax whatsoever. The respective Owners of each project have filed partnership returns for each of these

same years. Admittedly, these income tax returns include a full reporting of all income, expenses and other relevant data regarding the several projects and also indicate Owners' distributive shares of the profits and losses from the construction, operation and maintenance thereof. Collector concedes that all such partnership returns are true and correct insofar as concerns the legal issues and principles involved in this action.

For the years in question, Collector assessed Appellants' corporate franchise taxes on the assumption that the mortgages outstanding in Appellants' names on the public record represent borrowed capital of the corporations, notwithstanding the properties thusly acquired in Appellants' names were in truth and in fact purchased for the benefit of Owners. In so doing, the Collector relied upon La. R. S. 47:601 and 603, which pertinently provide:

> "Section 601. Imposition of tax
> Every domestic corporation and every foreign corporation, exercising its charter, or qualifed to do business or actually doing business in this state, or owning or using any part or all of its capital, plant or any other property in this state, subject to compliance with all other provisions of law, except as otherwise provided for in this Chapter, shall pay an annual tax at the rate of $1.50 for each $1,000.00, or major fraction thereof on the amount of its capital stock, surplus, undivided profits, and borrowed capital, determined as hereinafter provided; the minimum tax shall not be less than $10.00 per year in any case. The tax levied herein is due and payable on any one or all of the following alternative incidents:
>
> (1) The qualification to carry on or do business in this state or the actual doing of business within this state in a corporate form. The term "doing business" as used herein shall mean and include each

> and every act, power, right, privilege or immunity exercised or enjoyed in this state, as an incident to or by virtue of the powers and privileges acquired by the nature of such organiaztions, as well as, the buying, selling or procuring of services or property.
>
> (2) The exercising of a corporation's charter or the continuance of its charter within this state.
>
> (3) The owning or using any part or all of its capital, plant or other property in this state in a corporate capacity.
>
> It being the purpose of this section to require the payment of this tax to the State of Louisiana by domestic corporations for the right granted by the laws of this state to exist as such an organization, and by both domestic and foreign corporations for the enjoyment, under the protection of the laws of this state, of the powers, rights, privileges and immunities derived by reason of the corporate form of existence and operation. The tax hereby imposed shall be in addition to all other taxes levied by any other statute.
>
> "Section 603. Borrowed capital
>
> As used in this Chapter, 'borrowed capital' means all indebtednes of a corporation, subject to the provisions of this Chapter, maturing more than one year from the date incurred, or which is not paid within one year from the date incurred regardless of maturity date. As to any indebtedness which is extended, renewed or re-financed, the date such indebtedness was originally incurred or contracted shall be considered for the purpose of this definition the date incurred or contracted. . . . ."

Collector maintains he is entitled to rely upon the indicia of ownership disclosed by the public records which reveal Appellants as owners of the properties involved. Col-

lector also contends the unrecorded Nominee Agreements or counter letters are of no effect against him as a third party relying upon the face of the public records.

Conversely, Owners contend that the Nominee Agreements are in effect counter letters which establish Owners' equitable title to the properties involved as well as Owners' obligation for the mortgage indebtedness involved. It is Owners' position that Appellants acted merely as Owners' agents; consequently, Appellants could not and did not acquire either an equitable interest in the properties concerned or any personal obligation to repay the borrowed funds.

The trial court rendered judgment for the Collector on the grounds that Appellants did not establish their alleged agency status and, alternatively, that even if Appellants were agents, they were undisclosed agents equally liable with Owners for the mortgage indebtedness upon which each corporate franchise tax was computed. We agree with the result reached by the trial court, but for different reasons.

The stated purpose of the applicable statute, La. R.S. 47:601, et seq., is to require corporations to pay for the right to exist in corporate form and to take advantage of and exercise the rights, powers, privileges and immunities of corporate existence. The tax involved herein is assessable upon a corporation's qualifying to do business or actually doing business in the state. It is determined, in part, by the amount of borrowed capital employed by a corporation in the conduct of its corporate affairs.

The term borrowed capital, as used in the statute in question, has been interpreted by the Supreme Court in *State V. Union Bldg. Corporation,* 185 La. 598, 170 So. 7, as follows:

> "Manifestly the Legislature intended that the total amount of all capital made use of by a domestic corporation in the conduct of its business should be used as a basis for computing the franchise or license tax.

> In arriving at the total amount of capital used the following items are considered: First, the capital stock; second, the surplus, if any; third, undivided profits, if any; and fourth, borrowed capital, if any.
>
> (3) What the act means by saying that "if the capital used or invested in the business or enterprise of such corporations includes borrowed capital, in excess of the capital stock, surplus and undivided profits, such excess or" (of) "borrowed capital hall be added," etc., is that, if the corporation uses in the conduct of its business any borrowed or additional capital, that is, capital besides that which was contributed by the stockholders in the purchase of the stock, and the earnings of the corporation, this borrowed or additional capital must be added to the other capital in order to form a basis for computing the tax. The amount of the tax is computed upon the amount of capital used, and, if the corporation uses more capital than it owns, it must pay the tax not only on that which it owns but also on that which it does not own, that which it borrows and puts into the business. The sum total is the amount of "capital used or invested in the business or enterprise of such corporation," and forms the basis for "computing the franchise tax."

Recently, in *HEP Development Corporation v. Mouton,* 256 So. (2d) 744, this court applied the rule announced in *State v. Union Bldg. Corporation,* above, and noted that:

> "We understand the foregoing language in Union Building, above, to mean that for purposes of the tax in question that if a corporation makes use in its business of any borrowed or additional capital, aside from that which was contributed by its stockholders in the purchase of stock and corporate earnings, such

borrowed or additional capital must be considered in computing the tax in question."

Article 2 of the charters of each Appellant corporation provides that the objects and purposes for which the corporation was created are, among other things, as follows:

> "To take, lease, rent, hire, purchase or otherwise acquire and to own, use, hold, sell, convey, lease, mortgage, improve, develop and otherwise handle, deal in, promote, sub-divide, plan or dispose of, real estate, real property, and any interest or right therein."

Although the respective articles of incorporation do not expressly authorize Appellants to conduct their authorized activities as agents, we find the articles sufficiently broad to encompass Appellants' acting in a representative capacity.

The record establishes conclusively that Appellants were in fact acting as Owners' agents in the transactions involved herein. The Nominee Agreements or counter letters expressly provide that Appellants have no authority to take any action, sign any documents, or make any decisions affecting Owners' property without Owners' express written consent, authorization and direction. In each instance involved, Owners' presented Appellants with written instructions for carrying out the acquisition and development of Owners' properties. Without exception the instructions specifically recite that Appellants are to act solely as Owners' agents in carrying out the mandate.

State v. Union Bldg. Corporation, above, clearly declares the legislative intent to be that the total amount of all capital made use of by a domestic corporation in the conduct of its business, is to be considered in determining the amount of borrowed capital for purposes of determining

corporate franchise taxes due pursuant to La. R.S. 47:601 and 603.

Despite the agency relationship shown in this instance, we find the principles announced in State v. Union Bldg. Corporation, above to be applicable and controlling herein. We so hold because the intent of the pertinent statute has been held to be that funds borrowed for the exercise, use, enjoyment or performance of a corporate purpose, are to be considered in determining the amount of corporation franchise taxes due pursuant to La. R.S. 47:601 and 603. The legislative intent is to include in the term borrowed funds all sums borrowed by a corporation in the conduct of its business as a corporation. The tax is upon the corporate right to function in a corporate capacity, whether for the account of the corporation or as corporate agent for a third party. A corporation acting as agent for another party is nonetheless acting as a corporation and as such enjoying, exercising and utilizing the rights, privileges and immunities of a corporation nnder law. Appellants in this instance were all performing a function for which they were incorporated; that is, the purchase, mortgage and development of real property. It follows that the funds borrowed in the corporate name to achieve such purposes, were borrowed funds within the ambit of La. R.S. 47:601 and 603.

The judgment of the trial court is affirmed, all costs to be paid by Appellants.

Affirmed.